# STATE OF MICHIGAN

# COURT OF APPEALS

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CHARTER TOWNSHIP OF BREITUNG,

Plaintiff/Counterdefendant-Appellant,

v

DAVID R. ZEEB, SANDRA L. ZEEB, a/k/a LILLIAN ZEEB,

Defendants/Counterplaintiffs-Appellees.

UNPUBLISHED
May 19, 2000

No. 219336
Dickinson Circuit Court
LC No. 98-010320-CZ

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Before: Hood, P.J., and Saad and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right, following a bench trial, from the trial court's order denying plaintiff's request to enjoin a zoning violation. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff filed suit to abate an alleged nuisance per se that occurred on lots one, two, three, and four of block seven of the Ferndale Subdivision in Dickinson County. Specifically, plaintiff alleged that the area comprising lots one through four was zoned as R-1, residential. However, defendants, as current owners of the property, were using it to store and park commercial vehicles including semi-trucks and trailers. The R-1 residential classification prohibits the parking of commercial vehicles.

The proofs presented at trial established that lots one through four were zoned as R-1, residential, in 1958. Robert Carollo testified that his father leased a block shop to Wilfred Allard. The block shop was located across the street from lots one through four. During the course of the lease, Allard was allowed to park "his truck" across the street on lots three and four. However, Carollo testified that Allard stored only "one stake-body international flatbed truck" on lots three and four. The parking by Allard commenced in 1948, prior to the enactment of the 1958 ordinance that zoned lots three and four as residential. After Allard left the shop, the property was purchased by Donald Zambon. The exact date of sale to Zambon is unknown. The last receipt indicating a payment from Allard was dated August 3, 1964. Zambon operated a paint shop in the location where defendants currently operate their trucking business. Zambon parked his "equipment" on lots three and four. The

property was sold by Zambon to Herman Schomer. Earl Gauthier, Schomer's former employee, testified that there "probably" was a six to eight month gap between the time that Zambon stopped using "the property" and Schomer's use began. However, the exact date of the sale to Schomer was unknown. Schomer's widow, Lois, testified that they operated the property in 1968, but could not recall the exact date of purchase. Schomer requested permission from Carollo to level lots three and four so he could park vehicles on the property. Permission was granted, and Schomer put gravel down on lots three and four in order to prevent parked vehicles or equipment from sinking into the mud on those two lots.

Neil Barglind purchased the property from Schomer in 1976, and operated a trucking business until 1982. Barglind testified that he used lots three and four that were located across the street from the business to park on the property. The maximum amount of trucks that were parked on lots three and four were six. In 1982, defendants purchased the building from Barglind to operate a trucking business. Defendant David Zeeb testified that he had previously worked for both Schomer and Barglind and had observed the parking on lots three and four over the years. Since 1982, defendants had used lots three and four to park trucks and trailers on the property. In exchange for the use of lots three and four, defendants agreed to pay the property taxes assessed on the lots owned by Carollo. During the time of ownership of the trucking business, defendants used lots three and four to park various commercial vehicles, consistent with past usage. In 1997, defendants purchased lots one through four. Defendants leveled lots one and two and began to park vehicles on those lots as well. Defendants did not inquire about the zoning status of the lots prior to purchase and have never sought a variance for the use of lots one through four.

Joseph Erickson, superintendent for plaintiff, testified that lots one through four were zoned residential in 1958. In 1973, a new zoning ordinance replaced the 1958 version, but lots one through four remained zoned as residential. Once again, the zoning ordinance was changed in 1993, but the zoning for lots one through four continued as residential. Erickson acknowledged that plaintiff's enforcement of its zoning ordinances was initiated based on citizen complaints. Township resident, Anthony Ozello, who lived "kitty-corner" from the lots, complained about the use of lots one through four after he observed the grading of the lots. Ozello testified that lots one through four were never used for commercial parking until 1997, instead lots five and six were used for such parking. Other residents corroborated Ozello's testimony that lots one through four had not been used for commercial parking. However, the residents also acknowledged that there were no markings to delineate the property divisions between the various lots.

The trial court concluded that any parking and storage of commercial vehicles on lots three and four occurred continuously since Allard's ownership of the block plant in 1948. Therefore, defendants' conduct regarding lots three and four did not constitute a nuisance per se, and defendants could continue to park and store commercial vehicles on those two lots based on nonconforming use. The trial court held that nonconforming use did not apply to lots one and two, and defendants had failed to establish selective enforcement or that the doctrine of laches applied. Plaintiff appeals from the trial court's ruling that a continuous nonconforming use was established on lots three and four. Neither party

has appealed the trial court's decision regarding lots one and two. Accordingly, we will confine our discussion to the ruling regarding lots three and four.

Plaintiff first argues that the trial court erred in finding that defendants had established a nonconforming use on lots three and four. We disagree. Our review of the interpretation of a zoning ordinance is de novo, but we accord great weight to the findings of the trial court due to its opportunity to assess the credibility of witnesses. *High v Cascade Hills Country Club*, 173 Mich App 622, 626; 434 NW2d 199 (1988). Findings of fact will not be set aside unless clearly erroneous. *Eveline Twp v H & D Trucking Co*, 181 Mich App 25, 29-30; 448 NW2d 727 (1989). A finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.* In the present case, plaintiff filed a complaint to enjoin defendants from their nonresidential use of lots one through four. In an action seeking enforcement of a municipal zoning ordinance, the defendant may introduce, as a defense, that the use complained of was a lawful, vested, nonconforming use. 4 Rathkopf, The Law of Zoning and Planning (4th ed.), § 7, pp 66-13, 66-14. "The burden of proof is upon the party asserting a right to a nonconforming use to establish the lawful and continued existence of the use at the date of the enactment of zoning laws pertaining to it." 8A McQuillin, Municipal Corporations (3d ed.), § 25.188.50, p 55. "A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date." *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993), citing *Dusdal v City of Warren*, 387 Mich 354, 359-360; 196 NW2d 778 (1972). That is, where a party's lawful use existed prior to enactment of the zoning regulation, the use may continue after the zoning restriction takes effect. *Id.* Accordingly, once a property owner establishes a nonconforming use, the subsequent enactment of a zoning restriction will not divest the property owner of the vested right. *Id*. The prior use of the property is allowed to continue in order to avoid the imposition of hardship upon the property owner. *Gerrish Twp v Esber*, 201 Mich App 532, 533; 506 NW2d 588 (1993).

In the present case, the testimony established that Allard regularly parked a stake truck in lots three and four from 1948 on. Erickson testified that there was no zoning ordinance governing the property in 1948. However, in 1958, plaintiff enacted an ordinance that restricted lots three and four to residential use. Residential use included single-family dwellings and excluded the parking and storage of commercial vehicles. Accordingly, Allard's preexisting use of lots three and four constituted a vested nonconforming use. Plaintiff replaced the 1958 ordinance in 1973 and again in 1993, but both ordinances contained essentially the same language and maintained the residential classification of lots three and four. Despite the zoning regulations, the successors in interest to the Carollo property located across the street from lots three and four continued to use the disputed property for the parking and storage of commercial vehicles. Based on the testimony presented at trial, defendants were able to prove that lawful commercial use occurred prior to the residential classification of lots three and four and commercial use continued after the enactment. Accordingly, the trial court did not clearly err in finding that a nonconforming use of lots three and four existed prior to the enactment of zoning restrictions. *Eveline Twp, supra*.

Plaintiff next argues that defendants and their predecessors abandoned any nonconforming use on lots three and four. We disagree. The necessary elements of abandonment of a nonconforming use are intent to abandon and some act or omission on the part of the owner or holder that clearly demonstrates the decision to abandon. *Norton Shores v Carr*, 81 Mich App 715, 721; 265 NW2d 802 (1978). Lapse of time is not per se determinative of whether a nonconforming use has been abandoned. *Rudnik v Mayers*, 387 Mich 379, 385; 196 NW2d 770 (1972). The temporary cessation or temporary vacancy of a nonconforming use does not, by itself, operate to result in abandonment of a nonconforming use. *Id.* Rather, the circumstances, conditions, and statements of the owner must be consistent with or evidence an intention not to abandon the nonconforming use. *Id*. At trial, the testimony established that, at most, there was a lapse in use for a period of six to eight months.[1] However, there was no testimony presented at trial regarding the circumstances that lead to any temporary lapse in use. That is, plaintiff failed to present any evidence that the temporary cessation represented an intent to abandon as opposed to a delay caused by the sale of the business. Rather, plaintiff relies on the witnesses' inability to identify the exact date of purchase and sale of the properties and the lack of successive rental receipts for the building located across the street from the lots in dispute. Contrary to plaintiff's assertion, various witnesses testified that "something" commercial was always parked on lots three and four. The trial court assessed the credibility of the testimony and determined that the nonconforming use had not been abandoned despite the inability to identify specific dates of sale and purchase. Accordingly, we cannot conclude that the trial court clearly erred regarding the issue of abandonment. *Eveline Twp, supra*.

Plaintiff next argues that defendants improperly expanded the prior nonconforming use by increasing the type and number of commercial vehicles placed on lots three and four. We agree. The goal of zoning is to use the property in accordance with the designated zoning and gradually eliminate nonconforming use. *City of Troy v Papadelis*, 226 Mich App 90, 95; 572 NW2d 246 (1997). Nonconforming uses are to be gradually eliminated so that growth and development established by zoning ordinances can be achieved. *Norton Shores, supra* at 720. Zoning regulations are strictly construed with respect to expansion, and the policy is against extension or enlargement of nonconforming uses. *Reenders v Parker*, 217 Mich App 373, 376-377; 551 NW2d 474 (1996). Continuation of a nonconforming use must be of the same essential size and nature of the use existing at the time of passage of a valid zoning ordinance. *Norton Shores, supra*. The nonconforming use is restricted to the area that was nonconforming at the time the ordinance was enacted. *Id*.

In the present case, the nonconforming use at the time of enactment of the 1958 ordinance was limited. That is, Allard stored only "one stake-body international flatbed truck" on lots three and four. Accordingly, subsequent nonconforming use must be of the same essential size and nature of Allard's use. *Norton Shores, supra*. In *Independence Twp v Eghigian*, 161 Mich App 110, 112-113; 409 NW2d 743 (1987), the defendants parked a 1967 Ford dump truck weighing 17,000 pounds in their driveway. In 1975, the plaintiff limited commercial parking in residential areas to trucks weighing less than 10,000 pounds. Following the effective date of the ordinance, the defendants sold their truck and replaced it with a dump truck weighing 27,000 pounds. This Court held that the critical point for vesting the defendants' nonconforming use was the time of enactment of the zoning ordinance. Because the defendants' nonconforming use was for a 1967 Ford dump truck, any replacement vehicles would have

to be compared to that standard to determine whether there was an unlawful extension of defendants' vested use. *Independence Twp, supra* at 118.

Accordingly, any nonconforming use by defendants in the present case must be of the same essential size and nature as Allard's truck. While testimony was presented that defendants owned various semi-trucks and other equipment, there was no testimony to establish the size and extent of the truck used by Allard in comparison to the size and nature of defendants' commercial vehicles.[2] Accordingly, remand is required to determine whether defendants have a commercial vehicle comparable to the size and nature of Allard's in order to determine whether defendants can continue the vested use. However, we also note that the remedy for extension or expansion is not limited to a compelled lessening of the nonconformity. Rather, plaintiff may take advantage of an expansion or extension of a nonconforming use to compel a complete suppression of the nonconformity. *Austin v Older*, 283 Mich 667, 676; 278 NW 727 (1938). Indeed, the remedy of complete suppression would achieve the goal of returning the property to its zoned use. *Papadelis*, *supra*. Accordingly, the trial court, on remand, must determine whether a lessening or complete suppression of the nonconformity is warranted. If it is determined that lessening will be permitted, the trial court must determine if defendants have a commercial vehicle that is consistent with the nonconforming use established by Allard's flatbed truck to allow continuation of the vested nonconforming use.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Peter D. O'Connell

[1] Gauthier testified that he worked for Schomer Trucking in 1971, and was familiar with the property in dispute. Gauthier also testified that there was a six to eight month lapse between the time that Zambon stopped using "the property" and Schomer's use commenced. However, Gauthier was not asked to specify whether "the property" referenced the building upon which the business activities of Schomer Trucking took place or lots three and four. We will assume for purposes of the abandonment issue that Gauthier's reference was to lots three and four. We also note that Lois Schomer believed that they occupied the property as early as 1968, while Gauthier testified that "we moved" there in 1971. It is unclear whether Gauthier was testifying regarding a personal move to the area or the business occupation. In any event, any discrepancy regarding the date of occupation by Schomer is not material to the issue of abandonment when Gauthier clearly limited the lapse in occupancy to a six to eight month period.

[2] We cannot conclude, on this record, that a commercial vehicle owned by defendants would be consistent with the size and nature of Allard's flatbed truck used in 1948.